

CIVIL EQUAL JUSTICE AND THE JUDICIARY: THE LEADERSHIP CHALLENGE

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To no one will we sell, to no one deny or delay right or justice.

Magna Carta, cl. 40.

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of his laws, whenever he receives an injury. One of the first duties of government is to afford that protection....

Marbury v. Madison, 5 U.S. 137 (1803).

[T]he right of access to the courts is fundamental to our system of justice. Indeed, it is the right "conservative of all other rights." *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 28 S. Ct. 34, 52 L. Ed. 143 (1907). ... [M]eaningful access requires representation. Where rights and responsibilities are adjudicated in the absence of representation, the results are often unjust. If representation is absent because of a litigant's poverty, then likely so is justice, and for the same reason.

Miranda v. Sims, 98 Wn. App. 898, 909 (2000) (Ellington, J. concurring).

The vibrancy of our Democracy depends upon our willingness to ensure that the fullest range of voices and interests is represented and heard. This is what the fight for equal justice is all about.

Hon. Robert F. Utter, Washington Supreme Court, Ret.

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The failure to afford all of our citizens access to civil justice strikes at the heart of what this nation stands for — liberty and justice for all.

Hon. Gerry L. Alexander, Chief Justice, Washington Supreme Court, commencement address to the University of Washington Law School (June 2001).

The process of resolving conflicts fairly and impartially is an essential function of justice. All judges must keep the fora open and accessible.

Schroeter, Leonard, *The Duty of the Judiciary to Ensure Access to Justice*, 53 Washington Bar News No. 8 (August 1999) at 32.

Thank you for the opportunity to share my ideas on Access to Justice: Best Practices. With this paper I hope to stimulate new ideas and commitments in relation to the role of the judiciary in the struggle to achieve civil equal justice in our states and across the nation. It is my further hope that you will walk away with a better understanding of what is at stake when justice is wanting for an increasingly large segment of society. May it also be the case that you leave this conference with a renewed commitment to work to solve the civil equal justice crisis in your own states, and a more complete understanding of the need for the judicial branch and the larger civil equal justice community to work together to restore the faith of our citizenry in our justice based institutions.

Allow me the liberty of stating the obvious: The business of our justice system² is justice. Under our democratic form of government, primary responsibility for the resolution of civil, quasi-criminal and criminal disputes rests with the judicial branch. The judiciary performs two primary functions in this regard. First is exercise of the adjudicatory functions itself, and second is execution of the administration of justice. Central to the proper execution of its administrative role is the duty of the judiciary to make the machinery of justice open and meaningfully available to all. Let's not forget that the primary purpose of the United States Constitution is to "promote justice." This responsibility is embodied as a directive in the Constitution of my state, which directs that "justice in all cases ... be administered openly and without unnecessary delay." Wash. Const. Art. I, Sec. 10. Other states have similar constitutional directives.

If the business of the judicial system is justice, we are teetering on the brink of bankruptcy. Every day, in every state, in every locality, in virtually every courthouse, we stand witness to the systematic denial of justice for those in need of the protection of the laws. These are the victims of domestic violence in need of physical protection; farm workers who weren't paid for their work or are unable to obtain workers' compensation though suffering from pesticide exposure; and frail elderly people who have lost their homes to predatory lending schemes. These are the disabled service economy workers unable to secure transitional income and medical assistance for their families; status-based juvenile offenders who find themselves housed with and preyed upon by an adult criminal offender population; and disabled children denied critically needed

² The justice system includes not only state's trial and appellate courts, but also the vast and expanding network of various administrative agency adjudicative procedures that must often be exhausted as a prerequisite to judicial relief.

special educational services. And these are just a small sampling of the many thousands who need legal help but who, because they are poor, will never drink from the cup of justice.

On the criminal side, the governmental duty to promote justice, provide due process and ensure equal protection of the law is realized through constitutional requirements that legal counsel be appointed for indigent criminal defendants and that individuals be brought to justice directly and without delay.³ At present, no such rights attach on the civil side.⁴ Nevertheless, it remains the paramount constitutional responsibility of the judiciary to ensure that access to the machinery of justice is meaningfully available. This is especially true in those areas where:

1. The judicial branch has been assigned by statute or has assumed by court rule or case law *exclusive responsibility* for addressing issues relating to --
 - an individual's legal status (*e.g.*, marriage/divorce, child custody, guardianship),
 - access to or the ability to maintain life essentials (*e.g.*, education, nutrition, shelter, medical care), or
 - which implicate fundamental or constitutional interests; and
2. There exists *no other forum* within which these matters can be addressed and disputes resolved.

But why should you, our nation's state supreme court chief justices, our you, our nation's state court administrators care about this issue? Why is it your burden to address the civil equal justice problem?

At stake here is the very legitimacy of the system of laws that govern every aspect of civil society; the laws that provide certainty of expectation in matters personal, matters corporate, matters financial, and matters constitutional. As former LSC President, John McKay recently observed:

Law forms the fabric of our society, governing everything from economic relationships to the most personal and family matters. It defines codes of conduct and, in doing so, establishes standards and expectations that apply to all people in this nation. The law protects individuals from the excesses of government and the marketplace, and provides the means of vindicating rights that have been violated. For our laws to work, however, the system of its enforcement must be within the grasp of every citizen, not just those with wealth. In the absence of meaningful access to the machinery of justice, law becomes an unfulfilled promise. History teaches that social disharmony and upheaval is inevitable when a significant

³ I do not mean to suggest that states and counties fund indigent criminal defense services at the level necessary to discharge this constitutional obligation. But at least there is a constitutional benchmark against which a given state or county's investment in these services can be evaluated.

⁴ Regarding the potential of establishing a *Civil Gideon*, I commend the reader to review a series of articles authored by Washington State Access to Justice Board Jurisprudence Committee Chair, Leonard Schroeter, and published in the Washington State Bar News over the past couple years. These articles can be accessed via the Web from the WSBA Access to Justice site: <http://www.wsba.org/atj/publications.htm#Jurisprudence>. See also, Note, *The Indigent's Right to Counsel In Civil Cases*, 76 Yale L.J. 545 (1967); The Honorable Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 Yale L. & Pol'y Rev. 503 (1998).

segment of society is unable to secure meaningful access to and protection under the laws.⁵

Understanding the importance of the law in relationship to society and the relationship between equal access to the justice system and the very legitimacy of the justice system, the National Conference of Chief Justices recently observed that:

- The promise of equal justice under law is not realized for individuals and families who have no meaningful access to the justice system;
- This *de facto* denial of equal justice has an adverse impact on these individuals, families, and society as a whole, and works to erode public trust and confidence in our system of justice;
- The Judicial Branch, in our constitutional structure, shoulders primary leadership responsibility to preserve and protect equal justice and take action necessary to ensure access to the justice system for those who face impediments they are unable to surmount on their own; and
- That judicial leadership and commitment are essential to ensuring equal access to the justice system and to the achievement through nationwide effort of equal justice for all.⁶

Now, notwithstanding these observations, there are some who might argue that the leadership of our nation's judiciary – judges, clerks and court administrators – sees the “problem” not as one of justice and fairness, but one of efficiency of operation. Some might even suggest that despite the current challenges of docket control; court congestion, and the parade of other horrors that accompany the explosion in the ranks of unrepresented litigants in our courthouses, the current situation is more efficient than if the poor who are today unrepresented were somehow able to secure legal counsel, because the involvement of counsel would inevitably slow down the processing of cases, places greater demands on our courts, and remove efficiencies that can be obtained through the strong encouragement of the unrepresented to settle their disputes at the risk of an adverse judgment. The cynic might even go so far as to suggest that those in whom the proper functioning of our judicial system has been entrusted might be so enamored of case processing efficiency that they are willing to sanction the routine waiver of important rights on a daily basis by countless numbers of unrepresented litigants due to their unfamiliarity with the legal system and lack of power.

While I have never personally encountered any member of the judiciary who was unconcerned with issues of justice and fairness, it is no doubt the case here in the state of Washington, as elsewhere, that such issues can find themselves relegated to the back seat when more pressing issues of budgets, court room space, docket control, electronic filing, and system efficiency rise to the forefront of concern. The potential for developing “solutions” to these problem which – albeit inadvertently -- operate in turn to compound the power imbalances and perpetuate the lack of justice available, is very great indeed.

⁵ McKay, John, *Federally Funded Legal Services: A New Vision of Equal Justice Under Law*, 68 Tennessee Law Review 101, 103 (Fall 2000).

⁶ National Conference of Chief Justices, Resolution No. 23 (January 25, 2001).

Technology (hotlines, kiosks, interactive web sites, electronic filing, etc.), mediation, mandatory settlement conferences, pattern forms, advice clinics, and many other innovative programs all have their place. But, if the legitimacy of the judicial system over which you have responsibility is to be gauged against the benchmark of whether that system “promotes justice,” there can no substitute for ensuring that the poor, the vulnerable, and yes, even the moderate income people for whom legal assistance is no longer affordable, have timely and meaningful access to legal counsel in cases where fundamental interests are at stake and the judicial system is the exclusive forum for the resolution of legal disputes. And as Judge Ellington from my state’s Court of Appeals so adroitly explained in the quote referenced at the beginning of this paper,

When rights and responsibilities are adjudicated in the absence of representation, the results are often unjust. If representation is absent because of a litigant’s poverty, then likely so is justice, and for the same reason.⁷

In the end you as the leaders and administrators of your states’ justice systems are the constitutional Stewards of Justice.⁸ Yours is the duty to ensure the proper and impartial administration of justice for all people in your states, rich and poor, haves and have nots, the socially acceptable and the socially disenfranchised. While your state legislatures, like ours here in Washington, will determine how much money will be appropriated to the third branch of government, it is ultimately your responsibility to determine whether and how brightly the flame of justice will continue to burn and who will have the opportunity to be enlightened by its glow. This is a non-delegable duty that inevitably accompanies your expansive constitutional authority.

In considering the manner in which you discharge your responsibility to make the machinery of justice available to all members of society, you must be sensitive to and accommodating of the needs not only of those who show up at the courthouse doors but also to the needs of those who have legal problems that need to be resolved through the judicial system but who do not pursue the opportunity to do. Despite the deluge of unrepresented individuals who we see every day in our trial courts and family law dockets, many others never get there. This may be because (1) they do not understand that their situation implicates legal rights, (2) their issues are too complex to be addressed through self-representation (with or without the assistance of a courthouse-based facilitator or assistant), (3) they fear the justice system,⁹ or (4) because they cannot secure legal assistance necessary to assert, enforce or defend the legal rights at issue. Whatever the reason, it is not acceptable to provide access to the system for those who find the courthouse and ignore those who have critical legal problems but do not come pounding on the door.

⁷ *Miranda v. Sims*, 98 Wn. App. 898, 909 (2000) (Ellington, J., concurring).

⁸ I would like to thank former Washington State Bar Association President Mary E. Fairhurst for the phrase “Stewards of Justice,” a phrase and concept that she applied not only to the judiciary, but aspirationally to all members of the legal profession in the hope that we would daily meet the expectations that arise from our status as inheritors of the noblest of traditions.

⁹ Those populations most socially, racially or economically marginalized have come to expect a lesser quality of justice and have substantially less confidence in the judicial system than those who fit within social, racial or economic norms. See Washington State Office of the Administrator of the Courts/GMA Research, *How the Public Views the Courts: A 1999 Washington State Survey* at 35-42. The inability to secure meaningful access to the system most certainly plays into these perceptions.

The poor and vulnerable, like the rest of us, experience a continuum of legal needs that are often multi-dimensional in nature. A person may need to know what his or her rights are in a given matter. A battered woman may need some help in filling out a form to secure a protection order. A recipient of welfare-to-work services may need some help presenting evidence in an administrative tribunal. Or, an individual or group of individuals may need extended representation on a complex civil matter. For example a case involving the rights a disabled child to special educational assistance; a case requiring the presentation of complex statutory or constitutional claims; or a case where the opposing party is well represented and where the balance of power has been unfairly tipped against them; and many, many other cases. A person may need representation on an individual matter pending before a court. Others may be involved in pursuing legal claims of significance to a class of similarly situated individuals and for whom pursuit of class relief is both necessary and appropriate. Some may need representation before an administrative agency in a rule making proceeding that implicates matters of direct significance to them. Still others may need representation on matters legislative in nature. No matter what the substance, no matter what the forum, the timely availability of legal counsel is key to the individual's effective pursuit and resolution of important civil legal claims.

As Stewards of Justice, the responsibility falls upon you to ensure that justice system consumers have access to the type and intensity of legal assistance commensurate with the nature and intensity of their legal needs. This does not mean that everyone gets a lawyer to appear in court, nor does it mean that every citizen has a right to litigate every little problem to the death at public expense. What it does mean is that technology based systems must be developed to ensure that legal advice and information is readily available to those who need it; that limited assistance must be made available to those who are capable of navigating the system on matters routine; that discrete task representation must be allowed so that limited matters can be addressed in a timely and efficient manner without forcing parties to suffer from the power imbalance that attaches when one side is represented and the other not. But these capacities alone will not be enough to ensure equal justice. There must also be systems to ensure that those in need of extended direct representation in the more complex, more intense, more contested cases, regardless of the forum, are able to secure the legal assistance that they need.

So, despite the Siren-like temptation to do so, we cannot be seduced into thinking that we will fix the equal justice crisis piecemeal, with a new set of technological bells and whistles. Kiosks and web sites don't generally make good oral arguments, aren't all that great at conducting cross examination, don't conduct discovery very well and, let's be honest, they are really bad at making offers of proof. All kidding aside, there is no substitute for methodically constructing a continuum of civil equal justice delivery capacities in each and every state. And I'm pleased to say that we are beginning to do so.

Today, across the nation, in every single state, we are witnessing a new effort to build inclusive state-based civil equal justice communities – communities dedicated to ensuring the full continuum of civil equal justice capacities outlined above. Fueled in large part by the federal Legal Services Corporation's State Planning Initiative, supported by the ABA and National Legal Aid and Defender Association's joint State Planning Assistance Network (SPAN), but independently generating new energy, excitement and critical mass of their own, these efforts to

build enduring state-based civil equal justice communities are grounded in certain fundamental truths. These are:

- Equal justice is everybody's business. Everyone needs to be involved in building a statewide civil equal justice community. Ensuring access to justice is no longer the exclusive province of staffed legal services programs and program executives. It is an obligation borne by a broad community of stakeholders including the bench, judicial system administrators, the organized bar, law schools, pro bono lawyers and programs, domestic violence advocacy programs, social and human services providers, and many others.
- If justice is to prevail, a state equal justice system must be responsive *and accountable* to the needs of *all* consumers, regardless of who they are, where they reside, and the nature or intensity of the legal problems they experience. A full continuum of legal representational capacities must be developed and maintained in order to ensure the capacity to deliver the commodity that we are working to produce – justice.
- It is not acceptable to write communities of consumers out of the justice system simply because they are socially or politically disfavored. Equal justice -- the credo of our common faith -- requires that all who need legal assistance have equitable access to the same, regardless of their station in life, their social or political status, or their ability to afford legal counsel.
- The justice system must be consumer-centered, culturally competent and relevant to the diverse interests and needs of those in need of its protection. Concepts of inclusion, diversity, and multi-cultural competency must be incorporated as enduring values that undergird any state civil equal justice delivery system. Justice must be available to those who suffer disparate treatment or experience disparate obstacles to access.

From New Hampshire to Florida, West Virginia to Missouri, Texas to Montana, California to Washington, state based civil equal justice communities are being forged. It is happening in your state. If you don't know it, something is terribly wrong, for central to the success of the endeavor in any state is the active and responsible engagement of the judiciary. A harbinger of failure is the lack of such engagement. When you go back home, take the time to learn about the civil equal justice planning activities in your state and find out how you and your courts can play the leadership role that attaches by your status as the constitutional Stewards of Justice.

Judicial leadership comes in many forms. Increasingly, it is evidenced in the creation and staffing of statewide access to justice coordinating bodies. When our Supreme Court created it in 1994 (after multiple failed efforts – nothing comes easy in the land of equal justice), the Washington State Access to Justice Board was the first entity of its kind in the nation. It was charged with coordinating civil equal justice related activities, expanding resources available to meet the needs of low and moderate consumers of legal services, and ensuring effective, responsive and efficient delivery of civil legal services throughout the state. Today, Washington State is far from unique in this regard, as there are nearly 20 formal state civil equal justice coordinating entities that have either been created or substantially supported by the highest court in the state. New bodies are forming as we speak.

Just this past year, the Texas Supreme commissioned an access to justice coordinating entity. Similar efforts are underway in Nebraska, Arkansas, and Missouri. These bodies will join the ranks of other entities in California, Illinois, Maine, Louisiana, West Virginia and a number of other states. If your state does not have such an entity, or if your court or office of court administrator is not actively engaged in the activities of such a body, allow me to suggest that the time has come for things to change in your state. The time has come for you, as Stewards of Justice, to assume the mantle of leadership. There is help available. You just need to ask.¹⁰

This past February, the Washington State Access to Justice community published a manual designed to help states build broad based, enduring civil equal justice communities. The manual is entitled *The Noblest Common Denominator: A Road Map for Building An Equal Justice Community*.¹¹ Our community dedicated the manual to newly retired Chief Justice Richard P. Guy, a giant in his commitment to the cause of equal justice. We were honored by Justice Guy's willingness to share his personal experiences and observations in the introductory section of the manual, and with his enthusiastic permission, I commend these to you today. Justice Guy stated:

As the leader of this state's justice system, I believe it is the Supreme Court's paramount responsibility to ensure equal justice for all the people of our state, not just those who can afford to pay for needed help. To this end, I am working hard to ensure that equal justice leaders in my state are actively building a justice system which provides meaningful access for all. I have visited our Congressional delegation to talk about the need for increased funding for legal services; I supported the establishment of our Access to Justice Board; I encouraged the expanded use of non-attorneys, such as courthouse facilitators, to improve access; I am advocating the development and use of cutting edge technology to expand access to our justice system; and every year I don a feather boa or other silly outfit and join the growing cast of our annual Access to Justice Conference skit.

But I am just one of the leaders in our state. I couldn't do it all, and I couldn't do it alone. I relied heavily on a strong partnership between the Supreme Court and the Washington State Bar Association; I trusted the collective experience, wisdom, and dedication of our legal services project directors, volunteer attorney legal services program coordinators, specialty legal services providers, law schools, and other equal justice partners; and I benefitted from the experience and ideas of members of the bar, bench court administrators, clerks, courthouse facilitators, law librarians, and other court personnel. In short, I was (and will continue to be) a partner in Washington State's Equal Justice Community whose

¹⁰ The ABA/NLADA State Planning Assistance Network (SPAN) is rededicating itself to providing support for the creation and evolution of state based civil equal justice planning and coordinating bodies. Robert Echols is staff to SPAN. His e-mail is SPAN@nlada.org. In addition, the federal Legal Services Corporation Office of Program Performance provides technical support and guidance to state justice communities through its State Planning Initiative. For the planning responsible person in your state, contact Robert Gross, Senior Program Counsel for State Planning at 202-336-8800.

¹¹ Underwritten with a grant from the Open Society Institute, the Manual is available from: Joan Fairbanks, Justice Programs Manager, Washington State Bar Association, 2101 Fourth Ave., Fourth Fl., Seattle, WA 98121-2330.

members all share the NOBLEST COMMON DENOMINATOR: EQUAL JUSTICE.

Turning back to the topic of this session, allow me to affirm that the best practices, the most important practices, and the critically needed practices are those of judicial and judicial administrative leadership. No matter how innovative the technology, no matter how efficient the services, no matter how many pattern forms you develop, there is no substitute for a passionate institutional commitment to leadership and service to the cause that binds us all together:

EQUAL JUSTICE UNDER LAW

So, as I close, allow me to posit the following questions.

If not now, when? If not the judiciary, who?